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Alexander Painting, Inc. and Silver Palette, Inc. and International Union of Painters & Allied Trades, District Council 21. Cases 4–CA–32867, 4–CA–32868, 4–CA–32869, and 4–CA–32870

August 9, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On November 29, 2004, Administrative Law Judge David L. Evans issued the attached decision. The Respondents and the General Counsel filed exceptions, supporting briefs, and answering briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions as modified and set forth in full below.²

The judge found no merit to the allegation that the Respondents violated Section 8(a)(5) by failing to transmit dues to the Union from September 3, 2003, to February 23, 2004. The judge found that there was neither an admission by the Respondents, nor any evidence, that supports a finding that the Respondents failed to transmit dues during the period alleged. Contrary to the judge, we find that the record supports a finding of a violation in this regard.

¹ The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions were filed to the judge's finding that the Respondents violated Sec. 8(a)(5) of the Act by failing to furnish requested information to the Union.

In adopting the judge's finding that Respondent Silver Palette is the alter ego of Respondent Alexander Painting, Chairman Battista notes that the record demonstrates that the Respondents' motive was to use Silver Palette as a means to avoid Alexander Painting's statutory and contractual obligations. In light of this evidence, the Chairman finds it unnecessary to address whether a finding of alter ego status would be warranted even in the absence of this evidence of unlawful motive.

² We shall modify the judge's recommended Order to include the additional violation found, as discussed below, and to include the appropriate remedial language for the violations found. We shall also substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), *enfd.* 354 F.3d 534 (6th Cir. 2004), and to conform to the language set forth in the Order.

The record shows that Respondent Alexander Painting filed a Statement of Financial Affairs in its Chapter 7 bankruptcy proceeding. Included in this filing is a document, titled "Schedule E—Creditors Holding Unsecured Priority Claims," that lists the Union as a creditor for dues owed for January 2004, and further states that dues are owed under a note dated December 16, 2003. As the General Counsel contends in his exceptions, this document demonstrates that the Respondents indeed owed dues to the Union for at least some portion of the period from September 3, 2003, through February 23, 2004. In view of this evidence, we find that the record supports a finding that the Respondents failed to transmit dues to the Union during the relevant period, and in so doing violated Section 8(a)(5) of the Act as alleged.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents Alexander Painting, Inc. and its alter ego Silver Palette, Inc., Bethlehem, Pennsylvania, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Cease and desist from

(a) Failing to make required contributions to the welfare, pension, annuity, vacation, scholarship and education funds of International Union of Painters & Allied Trades, District Council 21.

(b) Withdrawing recognition from the Union as the collective-bargaining representative of the employees in the following bargaining unit: All painters, decorators, wall coverers, drywall finishers, glaziers and apprentices employed by Alexander Painting, Inc. or Silver Palette, Inc.

(c) Bypassing the Union as the exclusive representative of the employees in the bargaining unit and dealing

³ We shall leave to the compliance stage of these proceedings a determination of the amount of dues that the Respondent actually failed to transmit to the Union during this period. In light of our finding that the evidence establishes the Respondents' failure to transmit dues to the Union during the relevant period, we find it unnecessary to pass on our colleague's contention that the Respondents' answer to the complaint constitutes an admission of its failure to transmit dues during this period.

Chairman Battista concludes that the Respondents violated the Act by failing to transmit dues to the Union during all of the relevant period. The Chairman finds that the Respondents' answer to the complaint admits the relevant facts. Specifically, the Chairman finds that the Respondents' answer to the "dues" allegation of the complaint admitted that they "failed to make certain payments" and only "denied that this amounts to an unfair labor practice." Thus, the answer establishes the factual basis for the violation, and the Respondents failed to offer a valid legal defense.

directly with those employees over their terms and conditions of employment.

(d) Failing and refusing to furnish the Union with requested information that is relevant and necessary for the Union to function as the collective-bargaining representative of the unit employees or process their grievances.

(e) Failing to deduct and transmit employee dues to the Union when required by the collective-bargaining agreement which, by its express terms, was in effect during that period.

(f) Failing and refusing to abide by provisions of their collective-bargaining agreement with the Union by failing to use the Union's exclusive hiring hall when hiring bargaining unit employees.

(g) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole the unit employees by transmitting, with interest, the contributions owed to the following Union funds pursuant to the terms of the 2001 agreement with the Union from on and after September 3, 2001: (1) District Council 21's Welfare Fund; (2) the International's Union and Industry National Pension Fund; (3) District Council 21's Annuity Fund; (4) District Council 21's Vacation Fund; (5) District Council 21's Apprenticeship Training and Journeyperson Education Fund, herein called the Training Fund; (6) the National Apprenticeship Fund; and (7) District Council 21's Scholarship Fund, and make whole the unit employees by reimbursing them for any medical, dental, or other expenses ensuing from their unlawful failure to make such required contributions, with interest, from on and after September 3, 2001.

(b) Reimburse the unit employees for any expenses, plus interest, they have incurred as the result of the Respondents' failure to make the fringe benefit payments described above.

(c) On request, recognize and bargain with the Union as the exclusive representative of employees in the above unit with respect to rates of pay, wages, hours, and other terms and conditions of employment.

(d) Continue in force and effect the 2001 agreement, effective from May 1, 2001, through April 30, 2004, until the parties have reached agreement or impasse on all mandatory subjects of bargaining.

(e) On request, furnish to the Union information that is relevant and necessary for the Union to function as the collective-bargaining representative of the unit employees or process their grievances.

(f) Deduct and transmit employee dues owed to the Union for the period February 23 through April 30, 2004, and transmit dues owed to the Union for the period September 3, 2003 through February 23, 2004, with interest as set forth in the remedy section of the judge's decision.

(g) Comply with the terms and conditions of the collective-bargaining agreement to which the Respondents are bound by not avoiding the use of the Union's exclusive hiring hall when hiring bargaining unit employees.

(h) Offer full and immediate employment to those work applicants who would have been referred to the Respondents for employment through the Union's hiring hall were it not for their unlawful conduct, make those applicants whole, with interest, for any losses they may have suffered as a result of the Respondents' failure to apply the hiring hall provisions of the collective-bargaining agreement, and make the necessary payments on their behalf to the appropriate fringe benefit trust funds.

(i) Within 14 days after service by the Region, post at their Bethlehem, Pennsylvania facility copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since September 3, 2003, the date of the first unfair labor practice found herein.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. August 9, 2005

Robert J. Battista,

Chairman

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail to make required contributions to the welfare, pension, annuity, vacation, scholarship and education funds of the Union, International Union of Painters & Allied Trades, District Council 21.

WE WILL NOT withdraw recognition from the Union as the collective-bargaining representative of our employees in the following bargaining unit: All painters, decorators, wall coverers, drywall finishers, glaziers and apprentices employed by Alexander Painting, Inc. or Silver Palette, Inc.

WE WILL NOT bypass the Union as the exclusive representative of our employees in the bargaining unit and deal directly with our employees over their terms and conditions of employment.

WE WILL NOT fail and refuse to furnish the Union with requested information that is relevant and necessary for the Union to function as the collective-bargaining representative of our unit employees or to process their grievances.

WE WILL NOT fail to deduct and transmit our employees' dues to the Union when required by the collective-bargaining agreement which, by its express terms, was in effect during that period.

WE WILL NOT fail and refuse to abide by provisions of our collective-bargaining agreement with the Union by failing to use the Union's exclusive hiring hall when hiring bargaining unit employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole our employees by transmitting, with interest, the contributions owed to the following union funds pursuant to the terms of the 2001 agreement with the Union from on and after September 3, 2001: (1) District Council 21's Welfare Fund; (2) the International's Union and Industry National Pension Fund; (3) District Council 21's Annuity Fund; (4) District Council 21's Vacation Fund; (5) District Council 21's Apprenticeship Training and Journeyman Education Fund, herein called the Training Fund; (6) the National Apprenticeship Fund; and (7) District Council 21's Scholarship Fund, and WE WILL make whole our unit employees by reimbursing them for any medical, dental, or other expenses ensuing from our unlawful failure to make such required contributions, with interest, from on and after September 3, 2001.

WE WILL reimburse our employees for any expenses, plus interest, they have incurred as the result of our failure to make the fringe benefit payments described above.

WE WILL, on request, recognize and bargain with International Union of Painters & Allied Trades, District Council 21 as the exclusive representative of our employees in the above bargaining unit with respect to rates of pay, wages, hours, and other terms and conditions of employment.

WE WILL continue in force and effect the 2001 agreement, effective from May 1, 2001, through April 30, 2004, until the parties have reached agreement or impasse on all mandatory subjects of bargaining.

WE WILL on request, furnish to the Union information that is relevant and necessary for the Union to function as the collective-bargaining representative of the unit employees or to process their grievances.

WE WILL deduct and transmit employee dues owed to the Union for the period February 23 through April 30, 2004, and transmit dues owed to the Union for the period September 3, 2003 through February 23, 2004, with interest.

WE WILL comply with the terms and conditions of any collective-bargaining agreement to which we are bound by not avoiding the use of the Union's exclusive hiring hall when hiring bargaining unit employees.

WE WILL offer full and immediate employment to those work applicants who would have been referred to us for employment through the Union's hiring hall were it not for our unlawful conduct, WE WILL make those applicants whole, with interest, for any losses they may have suffered as a result of our failure to apply the hiring hall provisions of the collective-bargaining agreement,

and WE WILL make the necessary payments on their behalf to the appropriate fringe benefit trust funds.

ALEXANDER PAINTING, INC. AND SILVER
PALETTE PAINTING, INC.

Barbara C. Joseph, Esq., for the General Counsel.
Jeffrey S. Stewart, Esq., of Allentown, Pennsylvania, for the
Respondents.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This case under the National Labor Relations Act (the Act) was tried before me in Philadelphia, Pennsylvania, on September 14, 2004. On March 3, 2004,¹ International Union of Painters & Allied Trades, District Council 21 (the Union), filed with the National Labor Relations Board (the Board) the charges in Cases 4-CA-32867 through 4-CA-32870 alleging that Alexander Painting, Inc. and Silver Palette, Inc. (the Respondents), had committed certain unfair labor practices under the Act. After administrative investigation of those charges, the General Counsel of the Board issued a complaint alleging that the Union had been designated or selected as the collective-bargaining representative of certain of the employees of Alexander Painting, that Alexander Painting and the Union had entered a series of collective-bargaining agreements, that the Respondents are alter egos, and that the Respondent Silver Palette was a "disguised continuation" of the Respondent Alexander Painting which had ceased recognizing and bargaining with the Union. The complaint alleges that, in violation of Section 8(a)(3) of the Act, the Respondents had conditioned the continued employment of former Alexander Painting employees with Silver Palette upon those employees' resigning from the Union. The complaint further alleges that, in violation of Section 8(a)(5) of the Act, the Respondents have refused to bargain with the Union as the statutory representative of the employees by: (1) withdrawing recognition from the Union; (2) failing to deduct and transmit to the Union employees' periodic dues, as was required by a contract between the Union and Alexander Painting, which contract was effective by its terms from May 1, 2001, through April 30, 2004 (the 2001 contract); (3) failing to contribute to various union funds as required by the 2001 contract; (4) refusing to hire employees by seniority as required by the 2001 contract; (5) failing to furnish to the Union requested information about the relationship between Alexander Painting and Silver Palette; and (6) directly negotiating and dealing with employees concerning the terms and conditions of their employment with Silver Palette. The Respondents duly filed an answer to the complaint admitting that this matter is properly before the Board but denying the commission of any unfair labor practices.

¹ All dates that are mentioned are in 2004, unless otherwise indicated.

Upon the testimony and exhibits entered at trial,² and after consideration of the briefs that have been filed,³ I enter the following findings of fact and conclusions of law.⁴

I. JURISDICTION AND LABOR ORGANIZATION'S STATUS

The Respondents have stipulated or admitted that Alexander Painting and Silver Palette are corporations that, from a facility located at 937 Stefko Boulevard in Bethlehem, Pennsylvania, have been engaged in the business of performing residential and commercial painting services. During the year preceding the issuance of the complaint, Alexander Painting provided services valued in excess of \$50,000 to other enterprises within Pennsylvania, including Alvin Butz, Inc., which other enterprises are directly engaged in interstate commerce. Silver Palette annually provides services in excess of \$50,000 to other enterprises in Pennsylvania, which other enterprises are directly engaged in commerce. Therefore I find and conclude that at all material times the Respondents have been employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. As the Respondents further admit, at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

At trial, the parties entered into several stipulations, some of which were reduced to writing. The following statements of fact are based on those stipulations and upon testimony that is not disputed.

Alexander Pamphilis and Lisa Pamphilis are husband and wife. Before the events of this case, Alexander Pamphilis was the sole owner of all shares of Alexander Painting, and he held all corporate offices, and he was the sole member of its board of directors.⁵ Lisa Pamphilis did not participate in the management or labor of Alexander Painting. In 1997, Pamphilis met with representatives of the Union and signed a collective-bargaining agreement.

At time of trial, Kenneth Kraft was a business agent for the Union. Kraft testified for the General Counsel that he began working for Alexander Painting as a painter in 1991, and at some point thereafter he became that company's general manager. Kraft quit Alexander Painting in 1999 to begin working for the Union. Kraft testified that from 1997 until shortly before he quit working for Alexander Painting, Alexander Painting stayed current with its obligations to the Union's various benefit funds such as a health and welfare fund, a joint apprenticeship and training fund, and an annuity fund. In 1999, however, Alexander Painting began to fall behind in making its scheduled payments. In 2000, to catch up, Pamphilis signed a promissory note for the Union.

It was stipulated that Pamphilis incorporated Silver Palette on January 24, 2001; Pamphilis owned all shares of Silver Pal-

² Certain passages of the transcript have been electronically reproduced; some corrections to punctuation have been entered. All bracketed entries have been made by me.

³ The General Counsel's brief is an extraordinarily adept exposition of the relevant facts and applicable law.

⁴ The General Counsel's unopposed motion to correct the record is granted.

⁵ All references to Pamphilis are to Alexander Pamphilis, unless otherwise indicated.

ette and he became its president and secretary-treasurer at that time. Silver Palette, however, did no business through November 16, 2001. On that date, without the exchange of any money or other financial consideration having been given, Pamphilis transferred all shares of stock in Silver Palette to Lisa Pamphilis. Pamphilis and Lisa Pamphilis became the only members of Silver Palette's board of directors. Silver Palette continued to do no business.⁶

On June 4, 2002, on behalf of Alexander Painting, Pamphilis signed the 2001 contract. By its terms, the 2001 contract was effective from May 1, 2001 (retroactively) through April 30, 2004. The 2001 contract: (1) recited that Pamphilis had received and reviewed authorization cards that had been signed by a majority of Alexander Painting's employees and that, on the basis of that review, Pamphilis was satisfied that, under Section 9(a) of the Act, the Union represented a majority of Alexander Painting's employees in a unit of all "painters, decorators, wall coverers, drywall finishers, glaziers and apprentices"; (2) contained a "Preservation of Work" clause that required the terms of the contract to be applied to any business that the employer may operate, whether or not the employer operated the business "through family members or otherwise" if the work of that business came within the jurisdiction of the Union; (3) required checkoff and payment of contractually required union dues; (4) required Alexander Painting exclusively to hire employees who have been referred to it by the Union from its out-of-work list; and (5) required regular contributions to the following funds: (a) District Council 21's Welfare Fund; (b) the International's Union and Industry National Pension Fund; (c) District Council 21's Annuity Fund; (d) District Council 21's Vacation Fund; (e) District Council 21's Apprenticeship Training and Journeyman Education Fund; (f) the National Apprenticeship Fund; and (g) District Council 21's Scholarship Fund.

Kraft testified (without contradiction) that at some point in 2002, Alexander Painting paid off the 2000 note that was held by the Union, and it did catch up with what it had owed to the Union's funds, but then it began to fall behind again. On December 16, 2003, Pamphilis signed a second promissory note for the Union and the various funds for the amount of \$153,000 to be paid in installments for 24 months. Alexander Painting made the November 2003 payments to the funds and it made the December 2003 payment on the note, but then it paid nothing thereafter on the note or to the funds.

By letter dated January 22, Pamphilis, as president of Alexander Painting, sent to the Union a "notice to terminate" the 2001 contract "as of April 30, 2004" (again, the express termination date of that contract). Kraft testified that, according to contractually required reports by Alexander Painting, Alexander Painting employed "about 15" employees at the time of the January 22 letter.

Also beginning about January 22, Alexander Painting began laying off all its employees; it laid off its last employee on February 13. On February 19, Alexander Painting filed for a Chap-

ter 7 Bankruptcy listing, inter alia, the 2003 promissory note that was held by the Union.

On February 23, Silver Palette began operations as a painting contractor at the same 937 Stefkou Boulevard office that had been used by Alexander Painting up until February 19 when it ceased operations. That building was owned prior to February 19, and continues to be owned, by Alexander Pamphilis' father. It was stipulated that Silver Palette completed painting contract work that was begun by Alexander Painting, including jobs at the Silver Creek Construction site and the Rodale Press. It was further stipulated that Silver Palette purchased Alexander Painting's office equipment, painting equipment and vehicles and has been using Alexander Painting's customer information and contacts in its business operations.

It was further stipulated that, at all material times, Alexander Pamphilis has been president and secretary-treasurer of Alexander Painting and manager and job-estimator of Silver Palette, Lisa has been president and secretary-treasurer of Silver Palette, and Michael Etnyre has been (or was) the general manager of Alexander Painting. In these capacities, Alexander, Lisa, and Etnyre have been supervisors within Section 2(11) with the authority to hire employees.

Kraft testified that beginning about February 20, he received membership resignations from painters Scott Glose, Greg Tocci, Frank Allesch, Scott Boehner, and Rodney Navarre, all of whom had worked for Alexander Painting at the Silver Creek construction site. On February 23, Glose, Tocci, Boehner, and Navarre began working for Silver Palette, continuing the work that they had previously been doing when they were in the employ of Alexander Painting. On February 27, Silver Palette hired former Alexander Painting employee Jay Stetch. Kraft testified that Stetch called him to say that his resignation from the Union was in the mail, but Kraft further testified that he never received it. On June 28, Silver Palette hired Allesch. The Respondents stipulated that Silver Palette did not request these employees pursuant to the hiring hall provisions of the 2001 contract and that Silver Palette has not requested the referrals of any other employees from the Union. (None of the employees named in this paragraph testified.)

By letter dated February 26, on behalf of the Union, Kraft informed Pamphilis that the Union had noticed that Alexander Painting was operating Silver Palette as a nonunion contracting operation in apparent violation of the 2001 contract. Kraft further recited that, in order to determine the appropriateness of a grievance the Union demanded certain information. Attached was a numbered 79-paragraph request for information about Alexander Painting and Silver Palette. (Several of the numbered paragraphs had subparagraphs.) By letter dated March 1, Pamphilis (on Silver Palette stationery) responded that Alexander Painting had filed for bankruptcy and was out of business, that he was employed by Silver Palette as a manager but was not an officer or shareholder, and that the Union was not "entitled" to the information that it had requested.

Pamphilis was asked on direct examination why he sent the January 22 letter, attempting to terminate the relationship with the Union; Pamphilis answered:

⁶ As Lisa Pamphilis testified: "I guess when the stocks were transferred to—it was just a—empty company."

[W]e were having great financial difficulties and I had been talking to a lot of my advisors over those past couple of months. Like—well January and—my accountants, my attorneys. And they all said, you know, you're in trouble. And the only hope they—they said you got to get out of the Union. They said you're not—you're not making any money, you're never going to get out of this hole with the kind of profits, you know, with your cost structure, and we were spending so much for labor and benefits and our profit margins actually were showing losses almost every year since we were in the Union. And the only way—the only hope I had of paying those debts down was to—to get out of the Union and start making some money.

Pamphilis then gave some of the specifics of Alexander Painting's deteriorated financial situation which the General Counsel does not contest. On June 15, the bankruptcy proceeding for Alexander Painting was terminated by discharge of the trustee. (On direct examination, Pamphilis was led to testify that Alexander Painting had been discharged in bankruptcy, but, as discussed below, corporations cannot be discharged in a Chapter 7 proceeding, although specific debts may be.) The Respondents offered no evidence that Alexander Painting has been dissolved under Pennsylvania law.

Pamphilis denied that he originally formed Silver Palette in order to try to avoid dealing with the Union or to allow Alexander Painting to avoid its obligations under the 2001 contract. Pamphilis testified that he formed Silver Palette in early 2001 in the hopes that a second company could take advantage of the Union's market recovery program which allows some employers that have a contractual relationship with the Union to pay reduced wages and benefits on certain types of projects (such as residential and institutional work). Later in 2001, Pamphilis abandoned that idea but he did not dissolve Silver Palette. Pamphilis testified that the idea of operating Silver Palette as a union contractor that could operate within the Union's market recovery program

... just didn't work out to be practical. And if I decided not to go with the Union with that company and be non-union, then it would be a conflict with my contract. So pretty much I just put it in my wife's name so there would be no conflict of interests and just kind of shelved it—didn't do anything with it.

When asked specifically why he transferred all of his stock in Silver Palette to his wife, Pamphilis answered that:

Just so there would be no appearance of impropriety. Because I know there's a problem with having two companies or double-breasts [sic]—you know, what we're going through right now. I knew that that was a potential just having that. So I thought get it out of my name, just—I just thought it would be wise to do that.

Pamphilis further testified that Silver Palette began operations on February 23, with himself as the general manager and job-estimator. Pamphilis and Lisa became the only members of Silver Palette's board of directors. Pamphilis testified: "My wife owns the company. I mean I—I take—I run it for her. I take care of it. I manage it." Pamphilis does all the hiring and

firing and supervision of the work of the employees of Silver Palette. Michael Etnyre did some of those things for Alexander Painting before it ceased operations. Etnyre has never been employed by Silver Palette. Customers of Silver Palette contact Pamphilis, not Lisa, if there is a problem on a job. Silver Palette has the same law firm, accountant, and insurance agency that Alexander Painting utilized.

Pamphilis testified that the "focus" of Silver Palette is different from Alexander Painting's because the latter performed contracts throughout the Lehigh Valley with commercial and construction customers. Pamphilis did not testify what geographic areas, if any, that Silver Palette confines itself to. Silver Palette uses a different bank and a different payroll-processing company from what Alexander Painting used, but Silver Palette uses the same suppliers. Pamphilis testified that Alexander Painting had 18 or 20 employees when it ceased doing business. Silver Palette started with five employees, and, at time of trial, it had six employees. Pamphilis testified that Silver Palette finished two jobs at Lehigh University that Alexander Painting had started; after payment by the customer, Silver Palette paid Alexander Painting for its costs on the jobs.

On cross-examination, Pamphilis acknowledged that Silver Palette had about six "steady customers," all of whom had previously been customers of Alexander Painting. Silver Palette paid Alexander Painting nothing for the good will or files of Silver Palette's customers. Pamphilis and Lisa owned several vehicles that were first used by Alexander Painting and then by Silver Palette. Although the Pamphilises owned the vehicles personally, the bankruptcy records show that their sales were from Alexander Painting to Silver Palette. Pamphilis did not know why that was done in that manner. Silver Palette has a telephone number different from what Alexander Painting's had been, but if someone dials Alexander Painting's old number, he or she gets a recording that says to call Silver Palette's number. Silver Palette uses the same fax number that Alexander Painting did. Employees of Silver Palette are issued cell phones; the numbers are the same as those in use when the telephones were issued to Alexander Painting's employees.

When further asked on cross-examination how many hours Lisa works each week for Silver Palette, Pamphilis replied: "A couple of hours, a few hours, maybe." Pamphilis was also asked about the activation of Silver Palette and he testified:

Q. That's one reason you chose to make it a non-union company, was that so you didn't have to live under the constrictions or whatever of a collective bargaining agreement with all these requirements and funds and so forth, isn't that correct?

A. I guess you could say that.

Pamphilis also admitted that he negotiated individually with each of the six employees whom Silver Palette has hired, promising them the same wage and benefits that are (in Pamphilis' estimation) equivalent to those they had received when working for Alexander Painting.

When Alexander Painting operated at the Stefko Boulevard address, it paid rent to the building's owner, Pamphilis' father, but there was no lease. Silver Palette, however, has a lease with Pamphilis' father with the lease payments being the same

as what the rent had been for Alexander Painting. When asked why Silver Palette had a lease with his father, Pamphilis replied that Alexander Painting's bankruptcy attorney advised the lease for Silver Palette, but Pamphilis testified that he did not know why the attorney did so.

Scott Siska was hired by Alexander Painting in 1991, and worked as a journeyman painter until he was laid off in February with the other employees. When called by the General Counsel, Siska testified that in early 2002, when Etnyre was Alexander Painting's general manager, Etnyre told him that Silver Palette was being activated as a nonunion company because a union company was too expensive to operate. Etnyre further asked Siska if he would be interested in "managing or running" Silver Palette. Siska told Etnyre that he was not interested because he was active in the Union and wished to continue to be active. Siska further testified that Etnyre told him to keep their conversation "quiet."

Siska further testified that shortly before his February layoff, when rumors were circulating among the employees that Alexander Painting was about to close and Silver Palette was about to be activated, he encouraged other employees to stay in the Union and not go to work for a nonunion company like Silver Palette. Shortly after he was laid off, Siska directly contacted employee Scott Glose on the issue, but Glose told him that he did not know what to do. Thereafter, Siska received a telephone call from Etnyre; according to Siska, Etnyre "asked me to stop being persistent in trying to coerce Union members to stay with the Union, especially Mr. Glose." (Again, Glose did not testify.)

Gary Blose was hired by Alexander Painting in 1998, and worked as a journeyman painter until he was also laid off with other employees in February. When called by the General Counsel, Blose testified that, before his layoff, Etnyre told him that Alexander Painting was going out of business, that Silver Palette was being activated, that Blose could go to work for Silver Palette, and that "everything would be the same as far as the money, the same hourly rate, and the only thing that would be different would be I didn't have to worry about union dues." Blose further testified that he replied that he was "not interested."⁷

Blose further testified that a week after he was laid off by Alexander Painting at the Silver Creek worksite, he returned to the site to retrieve some of his personal property. That evening, Pamphilis telephoned him and accused him of coming to the site to solicit the customer to do business with a company that Blose was forming. After Blose assured Pamphilis that he had had no such intention, Pamphilis said that "there would be an opening available if I wanted it, to work for the nonunion company." Blose further testified that he responded that he was not interested. On cross-examination, Blose acknowledged that Pamphilis did not "specifically" tell him that he had to resign his membership in the Union in order to work for Silver Palette.

⁷ The General Counsel asked Blose why he had not been interested in working for Silver Palette, and Blose replied that it was because he "wanted to stay in the Union." General Counsel, however, did not ask Blose if that is what he told Etnyre.

If Lisa Pamphilis has previously had any experience in the painting industry, the Respondents did not bring out the fact. The General Counsel called her as an adverse witness. She appeared to have little knowledge or interest in the operation of Silver Palette,⁸ and without hesitation, she acknowledged that her husband makes all corporate decisions for Silver Palette. She further admitted that, while she signs some checks and contracts for Silver Palette, she signs, without question, whatever her husband puts in front of her to sign. Her husband attends all job meetings, drafts all bids, and makes all personnel decisions for Silver Palette, just as he (and Etnyre) had done for Alexander Painting.

CONCLUDING FINDINGS

The complaint alleges that the Respondents, Alexander Painting and Silver Palette, are alter egos, that Silver Palette is no more than a disguised continuance of Alexander Painting, and that, in violation of Section 8(a)(5), the Respondents have used Silver Palette's corporate identity as a bogus shield to evade contractual and statutory responsibilities that had been undertaken by Alexander Painting. As quoted above, Pamphilis frankly admitted that he sought to terminate Alexander Painting's contract with the Union because Alexander Painting was in debt and "the only hope I had of paying those debts down was to get out of the Union and start making some money." As well, Pamphilis admitted on cross-examination that he sought to operate as a nonunion company to avoid the "constrictions" and the fund requirements of the 2001 contract. Faced with these admissions, the Respondents have been reduced to the defense that, although Silver Palette has been *used* to avoid Alexander Painting's contractual and statutory obligations, there was no showing that Silver Palette had been *created* for such purposes. As the Respondents articulate this defense on brief: "In order to find that Silver Palette and Alexander Painting were alter egos, Your Honor must find that they have similarities in how and where they operate, but also must find that there was an unlawful motive behind the formation of Silver Palette." This is simply not the law.

The Board categorically rejected the Respondents' "motive" defense to the 8(a)(5) allegations in *Fallon-Williams, Inc.*, 336 NLRB 602, 603 (2001), where it stated:

We agree with the judge that GBS and Mercury are alter egos. In determining whether an alter ego relationship exists, the Board considers whether two entities have substantially identical ownership, management and supervision, business purpose, operation, customers, and equipment.⁴ Another relevant factor is whether one entity was created in an attempt to enable another to avoid its obligations under the Act. However, the Board has consistently held that such a motive is not necessary for finding alter ego status.⁵

Here, as the judge found, the parties stipulated that the two entities have substantially identical management, business purpose, operations, equipment, customers, and supervisors, and shared premises and facilities. In addi-

⁸ When asked what positions in Silver Palette that she held in addition to president, Lisa replied, "Secretary, treasurer, whatever."

tion, Jack Hanrahan is the sole owner of GBS, and his wife is the sole owner of Mercury. The Board has not hesitated to find alter ego status even though entities had different owners, when the owners were in a close familial relationship.⁶

Our dissenting colleague would find that Mercury is not the alter ego of GBS, solely because there is no showing that Mercury was created in order to avoid GBS' obligations under the Act. As our colleague concedes, however, that position has been rejected by the Board and, apparently, by most circuit courts of appeals that have considered the issue.⁷ And with good reason. It would be anomalous to allow an employer to walk away from a collective-bargaining agreement merely by changing its name but not the substance of its operations, even if the change in form is neither carried out for a nefarious purpose nor accomplished through deception. As the First Circuit has observed, "if a company merely changed its corporate form for legitimate tax or corporate reasons, it is hard to see why the new entity should be able to disregard an existing collective-bargaining agreement[.]" *NLRB v. Hospital San Rafael, Inc.*, 42 F.3d at 51.

⁴ *Crawford Door Sales Co.*, 226 NLRB 1144 (1976).

⁵ See, e.g., *APF Carting, Inc.*, 336 NLRB 73 fn. 4 (2001); *Dupont Dow Elastomers L.L.C.*, 332 NLRB 1071 fn. 1 (2000).

⁶ See, e.g., *Crawford Door Sales Co.*, 226 NLRB at 1144.

⁷ See, e.g., *Dupont Dow Elastomers L.L.C.*, supra; *NLRB v. Hospital San Rafael, Inc.*, 42 F.3d 45, 51 (1st Cir. 1994), cert. denied 516 U.S. 927 (1995); *Goodman Piping Products v. NLRB*, 741 F.2d 10, 12 (2d Cir. 1984); *Stardyne, Inc. v. NLRB*, 41 F.3d 141, 148 (3d Cir. 1994); *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 581 (6th Cir. 1986); *NLRB v. Tricor Products*, 636 F.2d 266, 270 (10th Cir. 1980); *Fugazy Continental Corp. v. NLRB*, 725 F.2d 1416, 1419 (D.C. Cir. 1984). But see, *Operating Engineers Local 150 v. Centor Contractors, Inc.*, 831 F.2d 1309, 1312-1313 (7th Cir. 1987); *Iowa Express Distribution, Inc. v. NLRB*, 739 F.2d 1305, 1311 (8th Cir. 1984); *Plumbers Local 343 v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465, 1470 (9th Cir. 1994).

That is, although a few cases have noted that the motive for the creation of a companion business entity is a "relevant factor," the question of motive is not controlling.

In this case, Pamphilis may have had (and probably did have) the lawful motive of operating under the Union's market recovery program when he created Silver Palette in January 2001. Pamphilis, however, soon abandoned that objective. In November 2001, without any consideration, Pamphilis transferred the stock in Silver Palette solely to his wife's name. An interfamily transfer of equity interests is a compelling factor in finding substantial business identities and alter ego status. As stated in *Advance Electric, Inc.*, 268 NLRB 1001, 1004 (1984):

At all times all stock in both corporations was owned by members of the Shoots family and all corporate officers and

directors also were members of that family. In such circumstances the Board and the courts find ownership and control of those companies to be "substantially identical" for purposes of determining alter ego status. *Crawford Door Sales Co.*, 226 NLRB 1144 (1976). See also *All Kind Quilting*, 266 NLRB 1187 (1983); *Campbell-Harris Electric, Inc.*, 263 NLRB 1143 (1983), enf'd. 719 F.2d 292 (8th Cir. 1983). Accordingly, we find that Advance and Beacon share "substantially identical" ownership for purposes of determining alter ego status.

If there had been a legitimate business purpose in that Pamphilis' November 2001 stock transfer, Lisa had no idea what it was. In his testimony, Pamphilis himself floundered for an explanation and finally came up with "I just thought it would be wise to do that." At any rate, the transfer was less than an arm's length transaction⁹ and suggests the nefarious motive was adopted by Pamphilis at some point after May 1, 2001, when the 2001 contract became effective.¹⁰

Other factors requiring a finding of alter ego status are also present. Lisa Pamphilis has been nothing more than a figurehead for Silver Palette. Alexander Pamphilis managed Alexander Painting when it was in operation,¹¹ and he admitted that "I run it [Silver Palette] for her [Lisa]. I take care of it. I manage it." As well, the business purpose of the two corporations is the same, painting. Pamphilis' statement that Silver Palette has a different "focus" because it does not have commercial contracts is meaningless because it is unsupported by business records and because Pamphilis did not suggest that Silver Palette would not accept commercial contracts if it could get them.¹² Moreover, the customers of the two corporations are essentially the same, as shown by the fact that Silver Palette is completing Alexander Painting's contracts. And six of Silver Palette's six employees once worked for Alexander Painting and Silver Palette is using the equipment (such as vehicles and scaffolding) that Alexander Painting once used. Finally, the daily business operation is the same, being conducted from the same

⁹ As stated in *J. Vallery Electric, Inc. v. NLRB*, 337 446, 451 (5th Cir. 2003) (as cited by the Respondents): "We also find that there is substantial evidence of an unlawful motive in the creation of JVE. VE's transfer of personal and real property, as well as stock, to Vallery or JVE without any consideration shows that there was not even a pretense of an arm's length relationship between JVE, VE, and the principals of each during the formation of JVE."

¹⁰ See also *NLRB v. Dane County Dairy*, 795 F.2d 1313, 1322 (7th Cir. 1986) ("Familial control constitutes common ownership and control."); *Goodman Piping Products, Inc. v. NLRB*, 741 F.2d 10, 11-12 (2d Cir. 1984) (finding common ownership when the predecessor was a corporation wholly owned by the husband and the successor corporation by the wife); *J.M. Tanaka Construction, Inc. v. NLRB*, 675 F.2d 1029, 1035 (9th Cir. 1982) (finding that ownership of businesses by members of the same family was one indication of alter ego status).

¹¹ The Respondents note that the General Counsel stipulated that Etnyre had been a statutory supervisor only for Alexander Painting, but they do not suggest that his authority as such had been anything but subordinate to Pamphilis.

¹² Pamphilis hinted, but did not testify, that Silver Palette operates in a smaller radius of Bethlehem than had Alexander Painting. Even if he had so testified, however, under no case authority or logic does a somewhat smaller geographic base establish separate identities.

building and using the same fax number and some of the same telephone numbers. Therefore, upon the authority of *Fallon-Williams*, *Advance Electric*, and a host of other authorities, I find and conclude that these factors are more than sufficient proof that Alexander Painting and Silver Palette are, and have been at all material times, alter egos.

The Respondents began operating as Silver Palette on February 23. Between that date and April 30, the 2001 contract was still in effect. During that period, the Respondents violated Section 8(a)(5) by their admitted, stipulated or undisputed (a) withdrawing of recognition from the Union, (b) directly dealing with their employees about their terms and conditions of employment, (c) failing and refusing to contribute to the various union funds, (d) failing and refusing to deduct and transmit to the Union employees' membership dues, and (e) failing and refusing to hire employees upon referral by the Union. Also before the 2001 contract expired, the Respondents began a continuing unlawful refusal to furnish information, as discussed below.

Additionally, the complaint alleges that the Respondents violated Section 8(a)(5) by their failures to make contributions to the Union's funds, and by their failures to deduct and transmit dues even before the February 23–April 30 period. The complaint alleges that those violations began on September 3, 2003, the Section 10(b) limitations date. Pamphilis did not dispute Kraft's testimony that in 2003 Alexander Painting had again fallen behind in its payments to the Union funds and that it made only two payments on the 2003 note that was intended to compensate for the 2003 deficiencies. Just when in 2003 those deficiencies began to accrue is not clear, but that factor does not defeat the allegation. In *Midwest Precision Heating & Cooling*, 341 NLRB No. 52 at fn. 5 (March 11, 2004), the Board specifically approved of the administrative law judge's designation of the Section 10(b) date as that of the inception of the violations where it could not be determined with certainty just when the employers had begun to repudiate their collective-bargaining agreement by failing to make contractually required payments to union funds. This is a stronger case than *Midwest Precision* because the evidence is clear that, as far back as 2002, Pamphilis (and Etnyre) were intending to use Silver Palette as a nonunion alternative to Alexander Painting, regardless of the contractual obligations that had been undertaken by Alexander Painting and regardless of the statutorily guaranteed desires of the employees for representation by the Union.¹³ Accordingly, I find that it is appropriate to date from September 3, 2003, the Respondents' violations of Section 8(a)(5) by their failing to contribute to the Union funds.¹⁴

Although Kraft testified that Alexander Painting had fallen behind in its payments to the Union funds before it began operating as Silver Palette on February 23, he did not testify that

Alexander Painting had fallen behind in deducting and transmitting employees' Union dues before that date. There being no admission on the point, and there being no evidence on the issue, I shall recommend that the complaint be dismissed to the extent that it alleges that the Respondents violated Section 8(a)(5) by failing to deduct and transmit dues from September 3, 2003, to February 23, 2004.

The complaint further alleges that the Respondents have continued to violate Section 8(a)(5) after the expiration of the 2001 contract. The Respondents have admitted or stipulated that, since April 30 they have not recognized the Union or observed the contract in any respect. Although by its terms the 2001 contract did terminate on April 30, the Respondents were not free thereafter to disregard the Union that had negotiated the contract on their employees' behalf. The Union remained the Section 9(a) representative of the unit employees, as recited in the 2001 contract.¹⁵

As the continuing collective-bargaining representative, the Union was entitled, upon demand, to information that could be relevant to the purposes of collective bargaining or the filing of grievances.¹⁶ The Respondents admit that on February 26, the Union had requested extensive information regarding the relationship between Alexander Painting and Silver Palette, and they further admit that on March 1 Pamphilis refused that request, and the Respondents further admit they have continued in that refusal after April 30. The relevance of the requested information is plainly demonstrated by the above-recited facts that establish the alter ego relationship between Alexander Painting and Silver Palette and the existence of the provisions of the 2001 contract that prohibit double-breasted operations ("through family members or otherwise"). The Respondents argue, however, that Silver Palette bears no responsibility for providing the information because it is not an alter ego of Alexander Painting and Alexander Painting had no such responsibility because the Union "already has all of the requested information."¹⁷ Of course, I have previously rejected the defense that Silver Palette and Alexander Painting are not alter egos. Moreover, although on cross-examination Kraft did admit that the Union possessed "half" of the information that it requested, it is left to conjecture what "half" he was talking about. When requested information is presumptively relevant or has been demonstrated to be relevant, the burden is upon the employer to establish any reason why it should not be required to furnish it.¹⁸ Therefore, the burden was upon the Respondents to demonstrate which information it was that the Union already possessed. This burden the Respondents have not attempted to meet, and this defense also fails. Accordingly, I find and conclude that by failing and refusing to furnish all of the requested relevant information to the Union the Respondents have violated Section 8(a)(5).

¹³ I refer specifically to the quoted admissions of Pamphilis and the entreaties by Pamphilis and Etnyre to Siska and Blöse to come to work for the nonunion company and Etnyre's instruction to Siska to keep their conversation quiet.

¹⁴ Of course, at the compliance stage of this proceeding the Respondents will be given credit for the two payments that Alexander Painting did make on the 2003 note that was intended to compensate for the deficiencies in payments to the funds.

¹⁵ See *Decorative Floors, Inc.*, 315 NLRB 188 (1994), and cases cited therein.

¹⁶ *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967).

¹⁷ Brief, p. 11.

¹⁸ *Somerville Mills*, 308 NLRB 425 (1992); *Postal Service*, 276 NLRB 1282 (1985).

The Respondents have also admitted that since April 30, Silver Palette has not paid into any of the union funds as required by the 2001 contract. The Respondents contend that they have not been obligated to contribute to those funds because the 2001 contract has expired and, anyway, Silver Palette was never a party to that collective-bargaining agreement. By being the alter ego of Alexander Painting, Silver Palette was, in effect, a party to Alexander Painting's contract with the Union. Because benefits of such funds are part of the unit employees' terms and conditions of employment, an employer's obligations to continue contributions to the funds survive the expiration of a collective-bargaining agreement, at least until there is an agreement that the contracting employer is no longer obligated or an impasse over the issue has been reached in bargaining.¹⁹ Therefore, as I find and conclude, the Respondents have violated Section 8(a)(5) by failing since the expiration of the 2001 contract to make required contributions to the Union's welfare, pension, annuity, vacation, scholarship and apprenticeship and journeyman education funds.²⁰ Similarly, the Respondents have continued to be required to hire the Union's referrals from its out-of-work list, even after the 2001 contract expired,²¹ and their failures to do so also violated Section 8(a)(5).

The Respondents have not, however, violated Section 8(a)(5) by their failures to deduct and transmit Union dues after the April 30 expiration of the 2001 contract because such requirements do not survive the expiration of the collective-bargaining agreement that created them.²²

Finally, the complaint alleges that, in violation of Section 8(a)(3) beginning in February, the Respondents "conditioned employment of [their] unit employees at Silver Palette on their resignations from the Union." The only evidence of what the Respondents told Alexander Painting employees about working for Silver Palette is contained in the testimonies of Siska and Blose. Siska testified that in 2002, Etnyre told him that Silver Palette was being activated as a nonunion company and asked if Siska would be interested in managing it. Siska declined. Then, shortly after he was laid off by Alexander Painting, Etnyre asked Siska not to encourage former Alexander Painting employees to "stay with the Union." Blose testified that Etnyre told him, shortly before he was laid off by Alexander Painting, that Silver Palette was being activated and that Blose could go to work for Silver Palette and that "everything would be the same as far as the money, the same hourly rate, and the only thing that would be different would be I didn't have to worry about union dues." Blose further testified that, shortly after he was laid off by Alexander Painting, Pamphilis called him and stated that "there would be an opening available if I wanted it, to work for the nonunion company."

The testimony of Siska and Blose, especially in view of the other evidence described above, strongly indicates that Alexander Painting discharged (or "laid off") its employees in order to continue its business operations as the nonunion Silver Palette. And there is no question that discharges for such an objective would have constituted violations of Section 8(a)(3) by both of the Respondents.²³ Violative discharges, however, are not alleged in the complaint.²⁴ The only 8(a)(3) allegation of the complaint is that the Respondents conditioned the continued employment of the employees upon "their resignations" from the Union. In none of the testimony, however, is there evidence that any Alexander Painting employee was told that he was required to resign his membership from the Union if he wanted to be employed by Silver Palette. To be sure, the testimonies of Siska and Blose prove that the Respondents were telling the employees that they would be required to forgo union representation if they wished to work for Silver Palette,²⁵ and such evidence fortifies my conclusions that the Respondents violated Section 8(a)(5) by repudiating the 2001 contract and by repudiating their continuing statutory obligations to recognize and bargain with the Union. But, although several of the Alexander Painting employees did resign their memberships, there nevertheless is no evidence that Pamphilis or Etnyre told them to do so before they were hired by Silver Palette, and, again, that is all that is alleged as a violation of Section 8(a)(3). In this posture of the case, it is therefore necessary to recommend dismissal of this allegation of the complaint.

THE REMEDY

On brief, the Respondents argue that processing of the complaint herein violates "the automatic stay provisions of the federal bankruptcy law." This is another misstatement of the law. It is well established that the institution of bankruptcy proceedings does not deprive the Board of jurisdiction or authority to entertain and process an unfair labor practice case to its final disposition.²⁶ Moreover, Board proceedings fall within the exception to the automatic stay provisions for proceedings by a governmental unit to enforce its police or regulatory powers.²⁷ The Respondents further argue on brief that the General Counsel may not seek any monetary remedies for the violations found herein because Alexander Painting has been discharged from Chapter 7 bankruptcy. Chapter 7, 11 U.S.C. Sec. 727(a)(1) clearly specifies that "The courts shall grant the debtor a discharge unless . . . the debtor is not an individual." Alexander Painting, of course, is a corporation, not an individual. Moreover, as fully discussed in *NLRB v. Better Building Supply Corp.*, 837 F.2d 377, 378-379 (9th Cir. 1989), the legis-

¹⁹ *NLRB v. Katz*, 369 U.S. 736 (1962).

²⁰ See, for example, *Gray's Cleaning Service*, 323 NLRB No. 195 (1997) (not reported in Board volumes) (welfare and pension funds), *Delano Hotel*, 263 NLRB 1418 (1982) (annuity fund), *H. Jonas and Son, Inc.*, 325 NLRB No. 228 (1998) (not reported in Board volumes) (vacation fund), *Decorative Floors, Inc.*, 315 NLRB 188 (1994) (apprenticeship and scholarship funds).

²¹ *American Commercial Lines, Inc.*, 296 NLRB 622 fn. 10 (1989).

²² See *Hacienda Resort Hotel & Casino*, 331 NLRB 665, 667 (2000).

²³ On brief, the General Counsel cites many cases on this point.

²⁴ Why the General Counsel chose not to allege discharge violations went unexplained.

²⁵ Why the complaint does not allege a violation of Section 8(a)(3) by the Respondents' conditioning employment with Silver Palette on the employees' forgoing union representation also went unexplained.

²⁶ See, e.g., *Cardinal Services*, 295 NLRB 933 fn. 2 (1989), and cases cited therein.

²⁷ See id., and cases cited therein; *NLRB v. 15th Avenue Iron Works, Inc.*, 964 F.2d 1336, 1337 (2d Cir. 1992). Accord: *Aherns Aircraft, Inc. v. NLRB*, 703 F.2d 23 (1st Cir. 1983).

lative history makes clear that discharge of corporations is not possible under Chapter 7 precisely because Congress did not wish to allow mere paper contrivances to be employed for the purpose of evading contractual (or statutory) obligations. Creating Silver Palette may not have been a contrivance, but husband-Alexander's putting 100 percent of its stock in the name of wife-Lisa assuredly was. Had there been some legitimate reason for the transfer, Lisa would have had some inkling of what it was, and Pamphilis himself could have done better than "I just thought it would be wise to do that."²⁸

Finally, Board adjudication must proceed despite the bankruptcy because Silver Palette, as the alter ego of Alexander Painting, is jointly and severally liable for the remedies found appropriate herein.²⁹ There is no argument, of course, that Silver Palette has been discharged in bankruptcy. Accordingly, these contentions of the Respondents must be rejected.

Having concluded that the Respondent Silver Palette is the alter ego of the Respondent Alexander Painting, that the Respondents constitute a single employer, and that the Respondents have committed certain violations of the Act, I shall recommend that they be ordered to cease and desist therefrom and take appropriate remedial action. The ordered action shall include the posting of the appropriate notice to employees and the making whole of employees who performed bargaining unit work for Alexander Painting or Silver Palette on and after September 3, 2003, for any losses suffered as a result of the Respondents' unlawful failure to abide by the terms of the 2001 agreement between Alexander Painting and the Union,³⁰ the amounts to be computed as provided in *Ogle Protection Service*, 183 NLRB 682 (1970), enf'd. 444 F.2d 502 (6th Cir. 1971), with interest and other required payments computed in the manner prescribed in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). The Respondents shall further be required to continue in full force and effect the 2001 contract, except for the union security and checkoff provisions, unless and until an agreement is reached or there is an impasse on all mandatory subjects of bargaining.³¹

The Respondents shall further be ordered to comply with the exclusive hiring hall provisions of the parties' contract, to offer full and immediate employment to those work applicants who would have been referred to the Respondent for employment through the Union's hiring hall were it not for the Respondent's unlawful conduct, and to make them whole for any loss of earnings and other benefits they may have suffered by reason of the Respondents' failures to hire them. Backpay is to be computed as set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with

²⁸ Again, the scheme of using Silver Palette to escape Alexander Painting's obligations was clearly devised after the effective date of the 2001 contract and after Alexander Painting's second round of falling behind in meeting its obligations to the union funds.

²⁹ See *Redway Carriers, Inc.*, 301 NLRB 1113 (1991), where not only were the involved corporations held jointly and severally liable for remedy of the unfair labor practices, the husband and wife who had concocted the alter ego scheme were also held personally liable.

³⁰ *Kraft Plumbing and Heating, Inc.*, 252 NLRB 891 (1980), enf'd. mem. 661 F.2d 940 (9th Cir. 1981).

³¹ *Midwest Precision*, supra.

interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

CONCLUSIONS OF LAW

1. The Respondents, Alexander Painting, Inc. and Silver Palette, Inc., are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. At all material times, the Respondent Silver Palette, Inc., has been and is the alter ego of the Respondent Alexander Painting, Inc.

3. At all material times, International Union of Painters & Allied Trades, District Council 21 (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

4. All painters, decorators, wall coverers, drywall finishers, glaziers, and apprentices employed by Alexander Painting, Inc., or Silver Palette, Inc., constitute a unit appropriate for bargaining within the meaning of Section 9(b) of the Act (the unit).

5. At all material times, the Union has been the designated exclusive collective-bargaining representative of the employees employed in the unit under Section 9(a) of the Act.

6. By the following acts and conduct the Respondents have violated Section 8(a)(5):

(a) Since September 3, 2003, and continuing to date, failing to make required contributions to the Union's welfare, pension, annuity, vacation, scholarship and education funds.

(b) Since on or about February 23, 2004, and continuing to date, withdrawing recognition from the Union as the collective-bargaining representative of the unit employees.

(c) Since on or about February 23, 2004, and continuing to date, bypassing the Union as the exclusive representative of the employees in the bargaining unit and dealing directly with those employees over their terms and conditions of employment.

(d) Since on or about February 23, 2004, and continuing to date, failing and refusing to abide by provisions of their collective-bargaining agreement with the Union by failing to use the Union's exclusive hiring hall when hiring bargaining unit employees.

(e) Since on or about March 1, 2004, and continuing to date, failing and refusing to furnish to the Union upon request information that is relevant and necessary for the Union to function as the collective-bargaining representative of the unit employees or to process their grievances.

(f) From on or about February 23, 2004, until April 30, 2004, failing to deduct and transmit employee dues to the Union as required by the collective-bargaining agreement which, by its express terms, was in effect during that period.

7. The Respondents have not otherwise violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended³²

³² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondents, Alexander Painting, Inc. and Silver Palette, Inc., of Bethlehem, Pennsylvania, their officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Withdrawing recognition from the Union as the collective-bargaining representative of the unit employees.
 - (b) Bypassing the Union as the exclusive representative of the employees in the bargaining unit and dealing directly with those employees over their terms and conditions of employment.
 - (c) Failing and refusing to furnish to the Union upon request information that is relevant and necessary for the Union to function as the collective-bargaining representative of the unit employees or to process their grievances.
 - (d) Failing to make required contributions to the Union's welfare, pension, annuity, vacation, scholarship and education funds.
 - (e) Failing and refusing to abide by provisions of their collective-bargaining agreement with the Union by failing to hire employees exclusively from the Union's out-of-work lists.
 - (f) Failing to deduct and transmit employee dues to the Union during the express effective period of a collective-bargaining agreement that requires such action.
 - (g) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) On request, bargain with International Union of Painters & Allied Trades, District Council 21 (the Union) as the exclusive representative of employees with respect to rates of pay, wages, hours, and other terms and conditions of employment in the following appropriate unit: All painters, decorators, wall coverers, drywall finishers, glaziers, and apprentices employed by Alexander Painting, Inc. or Silver Palette, Inc.
 - (b) Continue in full force and effect the 2001 contract, except for the union security and checkoff provisions, unless and until an agreement is reached or there is an impasse on all mandatory subjects of bargaining.
 - (c) Make whole the unit employees by paying contributions to the following funds monies which have not been paid and which would have been paid in the absence of the Respondent's unlawful unilateral discontinuance of such payments on and after September 3, 2003, as set forth in the remedy section of this decision: (1) District Council 21's Welfare Fund; (2) the International's Union and Industry National Pension Fund; (3) District Council 21's Annuity Fund; (4) District Council 21's Vacation Fund; (5) District Council 21's Apprenticeship Training and Journeyman Education Fund, herein called the Training Fund; (6) the National Apprenticeship Fund; and (7) District Council 21's Scholarship Fund.
 - (d) Reimburse the unit employees for any expenses, plus interest, they have incurred as the result of the Respondents' failures to make the fringe benefit payments described above.

(e) Within 14 days after service by the Region, post at their Bethlehem, Pennsylvania facility copies of the attached notice marked "Appendix."³³ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since September 3, 2003, the date of the first unfair labor practice found herein.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated at Washington, D.C. November 29, 2004

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail to make required contributions to the welfare, pension, annuity, vacation, scholarship and education funds of International Union of Painters & Allied Trades, District Council 21 (the Union).

WE WILL NOT withdraw recognition from the Union as the collective-bargaining representative of the employees in the following bargaining unit: All painters, decorators, wall coverers, drywall finishers, glaziers, and apprentices employed by Alexander Painting, Inc. or Silver Palette, Inc.

WE WILL NOT bypass the Union as the exclusive representative of the employees in the bargaining unit or deal directly

³³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

with those employees over their terms and conditions of employment.

WE WILL NOT fail or refuse to furnish upon request by the Union information that is relevant and necessary for the Union to function as the collective-bargaining representative of the unit employees or process their grievances.

WE WILL NOT fail to deduct and transmit employee dues to the Union when required to do so during the express effective period of a collective-bargaining agreement.

WE WILL NOT unilaterally repudiate, unilaterally alter, or refuse to abide by provisions of our collective-bargaining agreement with the above-named Union by failing to use the Union's exclusive hiring hall when hiring bargaining unit employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of employees in the above unit with respect to rates of pay, wages, hours, and other terms and conditions of employment.

WE WILL make whole the unit employees by transmitting, with interest, the contributions owed to the following union funds pursuant to the terms of the 2001 agreement with the Union from on and after September 3, 2001: (1) District Council 21's Welfare Fund; (2) the International's Union and Industry National Pension Fund; (3) District Council 21's Annuity Fund; (4) District Council 21's Vacation Fund; (5) District Council 21's Apprenticeship Training and Journeyperson Education Fund, herein called the Training Fund; (6) the National Apprenticeship Fund; and (7) District Council 21's Scholarship

Fund, and WE WILL make whole the unit employees by reimbursing them for any medical, dental or other expenses ensuing from our unlawful failure to make such required contributions, with interest, from on and after September 3, 2001.

WE WILL reimburse our employees for any expenses, plus interest, they have incurred as the result of our failure to make the fringe benefit payments described above.

WE WILL recognize and bargain with International Union of Painters & Allied Trades, District Council 21, as the exclusive representative of our employees in the above bargaining unit.

WE WILL continue in force and effect the 2001 agreement, effective from May 1, 2001, through April 30, 2004, until the parties have reached agreement or impasse on all mandatory subjects of bargaining.

WE WILL comply with the terms and conditions of any collective-bargaining agreement to which we are bound by not avoiding the use of the Union's exclusive hiring hall when hiring bargaining-unit employees.

WE WILL offer full and immediate employment to those work applicants who would have been referred to us for employment through the Union's hiring hall were it not for our unlawful conduct, WE WILL make those applicants whole, with interest, for any losses they may have suffered as a result of our failure to apply the hiring hall provisions of the collective-bargaining agreement, and WE WILL make the necessary payments on their behalf to the appropriate fringe benefit trust funds.

ALEXANDER PAINTING, INC. AND SILVER PALETTE
PAINTING, INC.